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# Lehi Irrigation Company v. Clarence T. Jones and Ed H. Watson : Brief of Respondent Jones to Amicus Curiae Brief

Utah Supreme Court

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Mulliner, Prince & Mulliner; Attorneys for Respondent;

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# In the Supreme Court of the State of Utah

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LEHI IRRIGATION COMPANY,

*Plaintiff and Appellant,*

vs.

CLARENCE T. JONES and ED H.

WATSON, State Engineer of the State  
of Utah,

*Defendants and Respondents.*

Case No.  
7189

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REPLY OF RESPONDENT JONES TO AMICUS  
CURIAE BRIEF

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**FILED** MULLINER, PRINCE & MULLINER  
Attorneys for Respondent  
Clarence T. Jones  
OCT 11 1948

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CLERK, SUPREME COURT, UTAH

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## REPLY OF RESPONDENT JONES TO AMICUS CURIAE BRIEF

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### STATEMENT

While it may be doubted that the matters interjected by *Amicus Curiae* are properly so brought into this case, we have asked and have been permitted by the court, to file a reply to the brief so filed. The State Engineer will file a separate reply brief.

We will cite pages from the Record with the letter "R", pages from the Transcript of Evidence with the

letter "T", pages from *Amicus Curiae* brief with the letter "A", and pages from our first brief with the letter "O".

A brief statement of facts may be of some help to the court. The location of natural streams and of cities may, of course, be judicially noticed. As may be gleaned from the Record, the general area irrigated since 1913 through the Provo Reservoir Canal extends from the upper Provo River northwesterly and above the cities and towns of Provo, Orem, Pleasant Grove, American Fork, and Lehi, and thence into Salt Lake County through the Narrows, where it is syphoned under the Jordan River.

The lands of the respondent Jones are adjacent to Dry Creek, 3 or 4 miles North and East of Lehi. As recited in our first brief, the waters involved are naturally used and reused after leaving the Provo River, before reaching the lands of this respondent. His upper lands have been irrigated for many years, and since 1913 some of the water used thereon has come from the Provo Reservoir Canal. The seepage or spring water arises in his own lands, and, the Record shows, mainly from his own irrigation on his upper land. This is indicated by his testimony as to the affect of his irrigation up there on the different springs.

A good picture can be obtained as to the springs and spring areas, and the uses of the water contemplated by the applications, if referene is made to his testimony (T. 10-29) and to the blue prints (Exhibits 1 and 2). His testimony is corroborated, but not disputed, except as to the Smith spring, which is above the Smith ditch, and is

shown in the lower right hand corner of Exhibit 2. Whether there can be any appropriation of this spring, or any of them, for that matter, will be up to the State Engineer, and will depend upon the final proof and final determination.

*Case 14645, Application 17805*, involves one spring, No. 12, Ex. 1. The use from this spring is for culinary and domestic purposes, and to a small extent for irrigation. The spring supplies 4 substantial strings of chicken coops and 2 residences with small lawns and a garden, and irrigation of about .9 acre of additional land. The total area covered by all these is between two and three acres, and, of course, all the water from the coops and homes without diminution, flows directly to Dry Creek, and the irrigated portions drain thereto. This spring water has been put to similar uses there since sometime in 1890, increased since 1913 by Provo Reservoir Canal and doubled since 1944 Deer Creek irrigation.

*Case 14646, Application 17806*, Exhibit 2, covers small springs shown as No. 1, No. 7, No. 8, and No. 9. These are on the North side of the Creek, and arise on and are to be used for irrigation of about 3.24 acres of land from which the water drains into Dry Creek. These seeps, unless the water is so diverted therefrom and used for irrigation, could only form small and useless marshes without any additional drainage reaching the Creek.

*Case 14647, Application 17807*, covers springs and spring areas shown as No. 2 to No. 6, and No. 10 and No. 11 in Exhibit 2. These are located on the South side of

the Creek, immediately below the springs covered by the previous application. They substantially all drain into the spring area shown as No. 10, the pasture.

This respondent testified that this whole spring area is marshy, so that it cannot be used now for pasture because the cows mire down, and it has got to be drained (R. 23). There is other testimony that hunters could not walk or ride a horse across it because of this condition. It is proposed to drain this into the fish pond, as shown on Exhibit 2. This use is non-consumptive, and could not diminish the return flow.

It would seem that the beneficial use contemplated by this application would not diminish the return flow. On the other hand, it would appear that if the applicant cannot apply the waters to a beneficial use, as contemplated, that his property would be substantially damaged and portions thereof rendered useless to him.

If appellant, or the Provo Reservoir Company, have any prior rights or clear appropriations that may be affected here, it may be assumed that these rights will be considered by the State Engineer in making a final determination as to what, if any, waters may be appropriated and beneficially used under these applications, without interference with other rights. And, in any event, it is certain that the mere approval of these applications does not affect any such rights, and, under the statute, the approval must be subject to prior right, and by its express term, it is subject to such rights.

Under the Record here, there would certainly seem to be some water in these springs which respondent may



beneficially use, and which neither the appellant under its alleged diligence right or *amicus curiae* under the Weber filings or 1943 diversion could claim. This is so, even if we assumed all that they both say as correct.

Approval of the applications by the State cannot result in giving respondent anything that he cannot ultimately acquire, without interference with prior rights. This approval merely leaves the matter open for determination of the amount of water he thus may acquire a right to use.

On the other hand, their rejection would leave him helpless to protect and beneficially use this, or even protect and use his own property. Certainly, neither of these objecting parties can appropriate his property for swamp storage of their water, if any they have here.

In our first brief, we supported by direct authorities, three propositions. These were:

1. That the issue raised on appeal as to Government filings on the Weber River could not, without any pleadings below, be raised for the first time on argument here.

2. That the objection based on possible claims by a third party stranger to the action, is not available to appellant here.

3. That on the merits, appellant's claims, whether arising under this or under its diligent creek right, as pleaded, did not justify rejection of these applications.

*Amicus Curiae* supports our statement that the issue was not raised by the pleadings below, and appellant makes no reply and no contention that it was. On the claim that was pleaded by it below, *Amicus Curiae* says



that it is "conceded by appellant" that the waters claimed have not been appropriated by it (A. 4); that it was established that appellant had no right (A. 5); and refers to it later as "a defeated litigant" (A. 7).

Our second point, as briefed and supported, is not contested at all, and the authorities cited (O. 8-12) are not challenged. These seem to entitle respondent to an affirmance of the judgment here.

The third point, on the merits as it relates to the appellant having no right to object to the approvals under its claim, as pleaded, is not questioned by it, and is endorsed and enforced by *amicus curiae*.

The point argued that it is conclusive that there is no unappropriated water, and the court must now peremptorily reject these applications, will be discussed later.

Because of quite numerous repetitions in the *amicus curiae* brief, we will attempt to shorten this brief by numbering some contentions made therein, which appear to us to be fundamentally erroneous, and will discuss these under each number in order. We will avoid extended discussion of the points so clearly made and supported in the informative and excellent brief filed by the State Engineer. We cannot cite this brief as printed, as it is not yet out.

Some main points of confusion and error by *amicus curiae* are on the following matters:

1. As to *amicus curiae* injecting his client as a party.
2. As to the nature and affect of the State En-

gineer's proceedings.

3. As to the effect of the decision there or here, as it relates to claims of parties, or as asserted by *amicus curiae*.

4. As to what constitutes appropriation, or what is unappropriated water. Record shows no prior appropriation of waters is involved.

5. As to what the court may here judicially notice.

6. The affect of injecting application No. 12144, as defeating previous contentions, and error in comment as to cases cited.

## BRIEF AND ARGUMENT

### I

That Provo River Water Users cannot become a party by appearance of its attorney *Amicus Curiae* seems clear. *Amicus Curiae* cannot, by statement that an outside party asserts rights in the subject of litigation, make it a party. Appearance *Amicus Curiae* is not an appearance for a party at all. It is merely as a friend of the court.

2 *Am. Jur.* pg. 679, Sec. 4. "RIGHTS AND POWERS OF AMICUS CURIAE — IN GENERAL. — As stated above, an *amicus curiae* is heard only by leave and for the assistance of the court upon a case already before it. He has no control over the suit and no right to institute any proceedings therein. It seems clear that an *amicus curiae* cannot assume the function of a party in an action or proceeding pending before the court, and that ordinarily, he cannot file a pleading in a cause. An *amicus curiae* is restricted to suggestions relative to matters apparent on the record

or to matters of practice. His principal function is to aid the court on questions of law.

\* \* \* \*

The appearance of an attorney as amicus curiae is not an appearance for a party, although he may be the regularly retained attorney of the party."

See also :

Beall v. Beall (Ore.) 128 P. 835 at 837

2 C.J. pg. 1325

If it were to become a party, it is equally clear that it would have to do so by proper appearance and intervention, and upon pleadings setting forth its claim. It cannot appear without pleadings or evidence to support its claim, and attempt to assert rights by mere statement of what it claims they are, and thus defeat the rights or claims of an actual party litigant. It would, obviously, have to be in the case in such a way that if its asserted claims could be adjudicated against it, it would be bound by such action. It could not, thus, offhand, defeat the claims of a party litigant without that party having the opportunity, by due process, to contest its claims. Otherwise, there would be no order in court procedure and no end to litigation, because any number of people could come in and assert claims taking up time of the court, and which, if they were properly presented and tried out, may be found not to exist.

The issue attempted to be raised, is the right of the Water Users Association to the water from the springs on respondent's property. This is a conflicting

right to that attempted to be initiated by the applications. The statement of *amicus curiae* (A. 5) that this issue may be here raised by his client is obviously incorrect. This court has also repeatedly held that the issue of such conflicting water rights cannot be determined at all by the State Engineer on such applications, or by the Court on appeal proceedings. (See Engineers Reply Brief.)

*Eardley v. Terry*, 94 Utah 367, 77 P. (2) 362 at 366:

“It should simply be determined whether the application was rightly rejected. In determining that question, the court stands in the same position as the Engineer. It must determine from the evidence whether there is probable cause to believe that there is unappropriated water available, or water which can be made available, for use.”

In this connection, it also appears that neither *amicus curiae*, nor his client, can properly assume to assert and represent the “Public Interest” claimed to be here involved. Waters of this State do belong to the public. The administration thereof, however, is exclusively with the State of Utah, and is by it enjoined upon its State Engineer. He is specifically charged with the duty of preventing waste and promoting greatest beneficial use. This is the policy of the State.

100-1-3 U.C.A. 1943:

“Beneficial use shall be the basis, the measure, and the limit of all rights to the use of water in this State.”

*Little Cottonwood v. Kimball*, 289 P. 116, at 117 and 125:

“In the arid region, water is precious, and it

is the undoubted policy of the law to prevent its waste and promote its largest beneficial use.”

\* \* \* \*

“The waste of water in arid regions is an evil that should be condemned. Water is a ‘precious fluid’; water is the ‘life of the desert’. But precious to whom? Precious to the farmer who uses it to make the earth give forth her bounties; fully as precious to him as to any other member of the community.”

## II

The brief erroneously assumes that the approval of these applications, “subject to prior rights”, will have some far reaching or destructive effect upon the whole plan of reclamation in the State. That water rights are thereby adjudicated or concluded.

We cannot add to the refutation of this assumption in the State’s reply brief. Certainly, rights of persons not appearing in such proceeding are not touched thereby.

*Little Cottonwood v. Kimball*, 289 P. 116, 118:

“The approval of an application to appropriate is only a preliminary step. It confers upon the applicant no perfected right to the use of water. It does not in any degree impair or diminish the existing rights of others.”

*Tanner v. Bacon*, 136 P. (2) 957, 967:

“No conclusion, finding or action of the Engineer in approving or rejecting an application to appropriate water is final or binding upon any party who may feel aggrieved thereby, except as to the right of the applicant to have his application filed, and thereby fix the time of his priority,

if he proceeds and completes or perfects an appropriation."

### III

The brief states (A. 7), and repeats, that if these applications are not here rejected by the court, the Provo River Water Users Association will "be substantially and adversely affected." These assertions are wholly unsupported, and appear to be entirely erroneous.

As pointed out in the State's brief, not only are the rights recited by *amicus curiae* unaffected by the Engineer's approval, but this is a private suit by one protestant and appellant claiming it would be aggrieved by the appropriations sought. Nobody but the parties hereto is, or can be, affected by this law suit, and it must be decided upon the claims and Record made by the parties hereto.

As quoted from Weil in our first brief (O. 10), he says:

"It is too obvious to require elaboration that the parties to a law suit must fight it out between themselves, and, at the same time, its results affect them alone."

It would be an affront to the court for us to here cite authority that persons who are not parties to a suit can be affected in any way by the judgment therein.

### IV

The brief appears to be entirely in error as to what constitutes an appropriation or what is appropriated water. It repeatedly asserts that all the waters involved have been appropriated by the United States, by the

Weber River filings, and that it “is the property of the Provo River Water Users Association.” On this contention, it apparently seeks to support the suggestion of the appellant, although it never contended that all the water involved came from the Weber, but sought to show, and did show, that some of it did not (T. 73). It is not true, by the Record, that all the waters sought to be appropriated by Jones have accrued to his springs from Weber River diversions. The testimony does indicate that about one-half the present flow has resulted from irrigation from the Deer Creek Project. But as above shown (T. 73), not all Deer Creek water comes from the Weber. And, as stated above, the water of these springs has resulted from irrigation on higher land, back to and prior to 1913.

It was found that the storage in Deer Creek was of waters “substantially all from the Weber River,” but not all. So, it is neither shown nor found that the higher irrigation is all from waters that came from the Weber.

This fact alone requires affirmance here, even if other claims were conceded, because if there is any water available, or which may become available, the Engineer’s approval must stand (see our first brief O.-4, and the State’s brief). And the assertion (A. 7) that only legal consequences of “undisputed facts is presented,” is erroneous.

But, independently of these, the brief of the State Engineer here conclusively shows that none of the waters claimed to have been previously appropriated by filings on Weber River were thus or at all appropriated. The



cases here cited establish, and it is undoubtedly the law, that the mere filing of an application is not, and may never result in, an appropriation. This brief also establishes that the duty of the State Engineer, as enjoined upon him by this court, was properly discharged here, and his discretion appropriately exercised.

As is pointed out by Weil on Water Rights, 3rd Ed., Sec. 289 (8), unappropriated waters may be any waters which, for the time, are not being put to a beneficial use, and appropriation is not accomplished by filing an application. He says, with reference to the use of the word in this connection, that it is sometimes used

“as denoting the first step in acquiring a right. ‘Appropriation is a much abused word; it is often loosely spoken of as the preliminary step—such as filing a notice making a claim to the water, or the like’, which is a wholly improper use of the word.”

In our first brief we cited Utah cases (O. 9) that appropriation is the actual application of the water to a beneficial use. These waters clearly are not being so applied by any objector here.

We call attention now to some additional matters in this connection. As we have already pointed out, this third party claim is not in issue, and is not presented, and is not before the court on this appeal. In this case, we had only to meet the claim, as alleged, of appellant’s diligence right. The trial court had only to determine whether that claim required the Engineer to reject the application. The Record was made on this basis. We could not have made a Record which might cover any sugges-

tion by a stranger in the court here on appeal.

We have also pointed out, and the State's brief has established, that claims such as are now suggested, involving the determination of quieting of title to water rights, could not have been involved or settled in an action of this character, to review the discretion of the State Engineer.

We also point out that this third party claim was never suggested until after the pleadings were settled, all evidence introduced, arguments made, and the case decided (T. 113). When it was suggested, or attempted, by the offer of the applications to appropriate Weber water, one objection was that these were not material to the issue pleaded (T. 117). Whether this was the sole ground of rejection, or not, we do not know. The court, however, indicated that it thought this ground was well taken (T. 118-119). This ruling, rejecting these applications, is not challenged here. The applications are not in evidence.

As further indicating the great number of questions that may be raised if the court were to attempt to litigate the alleged claims, as suggested by *amicus curiae*, as this is elaborated in the State Engineer's brief, we call the court's attention to the fact that these are percolating underground waters. If respondent's water from his higher lands had been permitted merely to run on the surface down to this lower ground, that would present the mere question of reuse by a user. As we suggested in our first brief, that is possibly the only claim to the right of reuse that could ever be involved here. However,

as to percolating waters, the question of identity becomes involved, in addition to the question of return and mingling with other sources of supply. And, the decisions of this court have thus far indicated that no one, except the owner of the land where percolating water arises, can establish a claim thereto, as long as it is not allowed to escape from his land (O. 5).

There would also be the issue as to whether these seeps result from some escape water of prior claimant, as suggested by the State Engineer. And necessity of exploring the whole field of "waters from foreign sources" (See Weil, Vol. 1 p. 60).

In view of what has been said, it would seem to be unnecessary to enter into a technical argument with reference to the contention of *amicus curiae* on the mention of "unappropriated waters on our statute." Apparently, in answer to our brief (O. 4) citing the decisions of this court that it is the duty of the State Engineer to grant the application if there "is or may be" water available for appropriation, or "if there is probable cause to believe there is unappropriated waters . . . which can be made available for use," a somewhat impassioned argument is made (A. 10). It is to the effect that "if it is brought to the attention of the State Engineer or the court at one or another stage of the proceeding that any of the water involved is not unappropriated," then the application must be arbitrarily rejected at the threshold. That this is not the interpretation given to our statutes by this court, is established by the State's brief here. It is argued that an affirmative

showing must be made before the State Engineer that there is no unappropriated water, or, otherwise, if there were no protest, the Engineer must allow any application. Of course, the showing that was made to the State Engineer is not before the court, and the statute also authorizes and requires an investigation by the State Engineer himself upon the ground.

Coming now to the statutes (A. 10), the use of "unappropriated" in the Title to 100-3-2, and the statement that in order "to acquire the right to the use of unappropriated public water, an application must be filed," in no way indicates that this question must be immediately and finally adjudicated. This is in connection with the preceding Sec. 1 that rights to use can now be acquired only by filing with the State Engineer. Then, Sec. 2 simply indicates this filing as the first step in acquiring use of unappropriated waters, and says this should be taken "before commencing" the construction of distributing works, or of work tending to acquire such rights. Then, the other steps are set forth in succeeding sections.

Then, coming to Sec. 8, dealing with matters to be considered by the State Engineer, the language is quoted:

"If an application does not meet the requirements of this section, it should be rejected."

There are a number of things set forth here, including the payment of fees, etc., including a reference to 100-2-14, which, under certain circumstances, imposes upon the applicant, the payment of the expenses of an examination

and an investigation of the physical situation by the State Engineer. This is immediately followed by the language quoted. It does not appear to apply to the question of unappropriated waters, which is a matter for the State Engineer's investigation and is not a matter which is under the control of the applicant, so that he could make his application "comply".

It is clear, from the cases cited in our first brief and in the State's brief, that there is no such compulsion by reason of this language, as is contended.

We must disagree, also, with the rule of interpretation (A. 11) to the effect that the Legislature, by repealing in 1939 the language in Sec. 8 that "where there is no unappropriated water in the proposed source of supply, it shall be the duty of the State Engineer to reject such application," intended the language of that repealed provision to remain in effect. The rule of construction, as we understood it, is exactly to the contrary.

Another matter of misconception in this connection is the reference to the language in the quoted statutes (A. 10) as to "unappropriated water in the proposed source." From this, it is argued that the "proposed source" here is Weber River. Each of these applications recites, in paragraph 6, that the "source of supply" is "unnamed springs" or "spring areas." The trial court specifically found (R. 36) that "the waters involved . . . are waters arising from springs and spring areas upon the lands of said defendant, and are sought to be applied to beneficial use upon his said land." It certainly appears that at least some of this water from these

sources, if not all of it, is unappropriated.

And so, the repeated statement that the respondent has established that he has no right is incorrect, as is also the statement that anyone can raise the matter by simply calling it to the attention of the court. They are attempting here to insert an allegedly adverse and prior right by merely asserting it in the brief. The illustration used (A. 6), by reference to a "quiet title" suit on the Walker Bank Building, would be more nearly in point if we were in an action to quiet title, and also, if in such suit, the bank building had been erected on land owned by one of the parties.

## V

In view of what has been briefed, the question of what may be judicially noticed here is, perhaps, a matter of interest, rather than of any great importance.

We questioned (O. 2) the suggestion made in appellant's brief that the court could so notice Deer Creek and "the details with respect thereto." However, in discussing appellant's lack of interest in any such matters, we traced the course of water from Weber River according to our knowledge. Now, the *amicus curiae* brief says (A. 9):

"It is *our opinion* . . . deer creek . . . its scope . . . and plan . . . is judicially known."

It goes then into great length and detail of facts, and of the Government's intentions, and other applications not in the Record (A. 27), and says (A. 28):

"As a result of all this, we believe the project is known to this court."

Again, no authority is cited. The burden of having this court consider all the matters so presented is upon the party claiming the right to such consideration. It is quite clear that the court may not take judicial knowledge of these, or of what it may know.

21 Am. Jur. p. 52:

“Section 21. Judicial, as Distinguished from Actual, Knowledge.—Judicial notice in any particular case is not determined or limited by the actual knowledge of the individual judge or court. There is a basic distinction between judicial notice and judicial knowledge. . . .”

104-46-1 U.C.A. 1943 recites what facts the court may take notice of. From this, it would appear that nothing that is recited here may be noticed, except the geography that is involved. From other statutes, however, and from interpretations in the general law, it appears that such geography may be considered; also, the existence of cities and towns, and the location of natural and important rivers and lakes (See 20 Am. Jur. p. 74, 77, 79).

*Bacon v. Plain City Irrigation Company*, 52 P. (2) 427. In this case, the court held that even where there had been a determination by the State Engineer in a general adjudication proceeding under the statute, and he had filed this as a proposed decree under the statute in the said proceeding, that in another case, arising out of this determination, neither the trial judge in the same court where that proceeding was pending, nor the Supreme Court on appeal, could take judicial notice of it.



The decision is reflected in the second syllabus, as follows:

“Neither trial court nor reviewing court could take judicial notice of proposed determination of water rights filed by state engineer with clerk of court, where document was not made part of the pleadings in action on assessments levied against irrigation company (Laws 1925, c. 100).”

This would appear to eliminate any filings here in other proceedings, or any adjudications on any such filings, or any determinations of the State Engineer with relations thereto.

The general law on this subject, and as reflected by other decisions of this court, such as 76 Utah 243, 267; 289 P. 116, seems to be well reflected in the following quotations:

“It was squarely held in *Robison v. Kelly*, 69 Utah 376, 255 P. 430, that the court cannot take judicial knowledge of its own records in another and different case.”

20 Am. Jur. p. 46:

“Section 16. GENERALLY.—It is a well-intrenched part of the judicial system that the judge sees only with judicial eyes and knows nothing respecting any particular case of which he is not informed judicially.”

20 Am. Jur. p. 48:

... “Generally speaking, matters of judicial notice have three material requisites: (1) The matter must be a matter of common and general knowledge; (2) it must be well and authoritatively settled and not doubtful and uncertain; (3) and it

must be known to be within the limits of the jurisdiction of the court.”

20 Am. Jur. p. 49:

“Section 18. MATTERS OF COMMON KNOWLEDGE.—The matter of which a court will take judicial notice must be subject of common and general knowledge. In other words, judicial knowledge of facts is measured by general knowledge of the same facts. . . .”

20 Am. Jur. p. 51:

“Section 20. EXTENT OF COMMON KNOWLEDGE.—Judicial notice is based upon the obvious reason of convention and expediency, for it operates to save the time, trouble, and expense which would be lost in establishing in the ordinary way facts which do not admit of contradiction. . . .”

## VI

Under this, we will try to throw some light generally on other matters discussed in the last 20 pages of the brief.

These are devoted to a somewhat enlarged and fancifully elaborated picture of reclamation achievements and Government intentions, to some propaganda apparently to influence the court to believe that everybody is interested in and excited about what we propose doing with some little springs on about 8 or 10 acres of land, in advising and warning the court as to its future policies, and to considerable caustic comment on our unfortunate ignorance of irrigation matters and irrigation law.

This last is a little disconcerting to a couple of old shovel pushing irrigators.

We are sure, also, that there is no great or universal concern or interest in the outcome here, and that no public calamity is likely to result.

Somewhat bitter comment is made on our statements: (1) that the filings on the Weber River, if in evidence, contain "no intimation of purpose to recapture, and there is before the court no intimation of this," and (2) that it "can't be assumed as probable" that the Reclamation Department will attempt to reposses the water involved.

The first statement is merely a correct statement of fact. The second statement of probability is made in relation to the language used by this court as to the duty to grant an application, if there is reasonable probability that water may be made available. These are called assumptions on our part, and then it is confidently asserted that the United States does intend to reclaim this seepage, apparently directly. And, if this is true, then, of course, to reclaim it on the lands of every farmer where seepage may appear from increased irrigation.

It is stated that we cannot help our case by "argument and conjecture," and yet, it seems clear to us that these are exactly what the writer of the *amicus curiae* brief is using throughout. He then introduces an argument which defeats about all that he has contended previously.

It was theretofore repeatedly argued that by reason of the filings on the Weber River, all the water coming from Deer Creek was thereby already appropriated. That by reason thereof, all the water arising from increased

irrigation therefrom, including the water here involved, and any other draining toward Utah Lake had been thus appropriated.

Now, he interjects filing No. 12144 (A. 27), which is a government filing on Utah Lake, based on withholding 30,000 acre feet in Deer Creek "in lieu of certain seepage return flow and/or other waters belonging to the United States which will flow into and augment the water supply of Utah Lake as a result of the construction and operation of Deer Creek Reservoir" (A. 32). This is an acknowledgement that such waters are under the jurisdiction of the State Engineer.

And of course, the Government must have considered its filing No. 12144 to be on unappropriated water, and on water, according to the previous argument as to the statutes (A. 10), which the Engineer must have found were unappropriated waters before approving this application. Then, if these waters were unappropriated and subject to this lower filing by the Government itself, how can *amicus curiae*, speaking here for the Government, contend as against us that the same waters were already appropriated by the Weber River filing. The Government's actions do not conform with the assertions of its spokesman.

Furthermore, it thus becomes apparent that it is not the intention of the Government to go in and claim, and thus prevent the use of seeps on farms over the system, but is rather the intention that these be generally put to beneficial use by the farmers, which is a high public use, and allowed then to flow into the Lake as the ulti-

mate drainage from the whole project. This would, at least, seem "probable".

While the brief cites no new authority, as we have above indicated, it does refer to two Federal cases, the Ide case and the Haga case, already cited by both parties to the action. We are somewhat belabored because of our claim that these cases are not of the same character as the one here presented, and for mentioning some other distinguishing features in our brief. Yet, both of those cases were cases directly on and involving the determination, and quieting title to, water rights. And, if it did not already appear from the cases cited in our first brief, it certainly appears from the briefs here now that this case does not and cannot involve any such determination or adjudication.

So far as we can see, every other distinguishing feature mentioned by us was correctly stated, and in view of the nature of this action, the comment (A. 19-20) is out of bounds, to say the least, and the statement (A. 21) that the Ide case is not distinguishable "unless it be ground of distinction that the Shoshone Project was constructed in Wyoming and the Provo River Project in Utah . . . that seepage water from Shoshone Project arose in a ravine and from the Provo Project in a spring," is absurd.

## CONCLUSION

It appears to us that the *amicus curiae* brief can bring in no new parties or any new or additional issues. That it adds nothing by way of support to the only claim

of the appellant, which is pleaded and in issue, but, on the other hand, asserts that appellant has no right under this claim.

That Weber River filings are not before the court, and are not in issue under the pleadings. That if they were in evidence and in issue, they would not constitute an appropriation of any waters whatsoever. That there is now here no claim of prior appropriations contended for.

That, as to the seepage waters involved, it is probable that at least some of these are subject to appropriation and beneficial use, and that this is a matter of final investigation and determination by the State Engineer.

That, in approving the said applications, he has not abused his discretion, but has proceeded properly in the premises.

Respectfully submitted,

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